In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1354

RICHARD L. OELSCHLAEGER, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 33-38) is reported at 389 F.2d 974. The district court wrote no opinion, but issued an order (Pet. App. 39) which is not reported.

JURISDICTION

The opinion of the court of appeals was filed on January 23, 1968. The petition for a writ of certio-

rari was filed on April 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals committed reversible error in holding that the Secretary of the Interior was reasonable in defining what land was withdrawn from entry by Public Land Order 576.

REGULATION INVOLVED

Public Land Order 576 of April 6, 1949, 14 Fed. Reg. 1614, reads in pertinent part as follows:

> By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943 [3 C.F.R. 1943 Cum. Supp.], and section 4 of the Act of May 24, 1928, 45 Stat. 729 (49 U.S.C. 214), it is ordered as follows:
>
> * * * *
>
> Subject to valid existing rights and withdrawals, the public lands within the following-described areas are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved as follows:
>
> * * * *
>
> (5) Under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage-Seward highway:
>
> Beginning at the southeast corner of sec. 33, T. 12 N., R. 3 W., S.M., thence by metes and bounds,

Southeasterly, 10 miles, parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of Chugach National Forest;

South, 1 mile, along west boundary of the Forest to the line of mean high tide of Turnagain Arm;

Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of sec. 32, T. 12 N., R. 3 W.,

East, 1¼ miles along south boundary of secs. 32 and 33 to point of beginning.

The area described contains approximately 6,700 acres.

* * * *

STATEMENT

In 1954, prior to the filing later that year of the Government's first official survey, petitioner settled on certain land along Turnagain Arm in Alaska in an attempt to initiate a homestead claim. In 1956, his application for final patent was rejected by the Anchorage Land Office on the ground that the land had been withdrawn from entry by Public Land Order 576, issued in 1949 and withdrawing from entry a strip of land "parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm" for the purpose of highway relocation (*supra;* Pet. App. 31-32).

In two administrative appeals, the Land Office decision was upheld on the ground that the surveyor's meander line was intended as the seaward boundary of the withdrawal and a one-mile-wide area measured from this line conflicted with the area claimed (Pet.

App. 1-7, 9-25). Petitioner sought judicial review, arguing in the district court, as he did before the Secretary, that the Land Order intended a seaward boundary as defined in *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10.[1] Accepting this argument, the district court ordered a determination based on the *Borax* line (Pet. App. 39).

Thereafter, the United States Court of Appeals for the District of Columbia Circuit reversed on the grounds that the Secretary's determination was reasonable, and that the *Borax* case did not govern the issue presented by the facts (Pet. App. 33-38).

ARGUMENT

Contrary to petitioner's assertions (Pet. 9-12), the decision below in no way conflicts with this Court's holding in *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10. That case concerned the extent of ownership rights conveyed by federal patents to lands adjacent to tidelands. The Court there held that while such federal patents are administratively described as being bounded by the surveyor's meander line, they carry with them ownership rights extending beyond that line to the true average of the high tides. In this case, however, there is no issue of the extent of ownership because all of the land was owned by the United States in 1949. The issue, instead, is what line was utilized in a Public Land Order which withdrew certain pub-

[1] Because of low-lying level mud flats and a great variance in the rise and fall of the tide in this area, the homestead sought probably lies one mile beyond this line (see Pet. App. 35).

lic land from entry and which was issued prior to the drawing of a meander line by survey. This distinction was the basis of both the rejection of petitioner's *Borax* line arguments in the administrative decisions (Pet. App. 4-5, 22-23) and the holding of the court of appeals that "*Borax* does not govern this issue, since it was concerned with vastly different matters, * * *" (Pet. App. 37).

In upholding the Secretary's construction of P.L.O. 576, the court of appeals found it necessary to consider only that his interpretation was consistent with other aspects on the face of the 1949 order (i.e., the "meander corner" reference and distance from "other platted points"), and that the only proposed alternative, the *Borax* line, was inconsistent with these aspects (Pet. App. 36). In these circumstances, the Secretary's decision was clearly correct and did not require elaboration. Hence, petitioner's arguments and authorities to the effect that grounds not relied upon by the adminstrative agency may not be invoked to validate the decision under review (Pet. 13-18) are inapplicable. *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 246-248.

Similarly, petitioner's assertions that due process has been violated (Pet. 19-23) are unfounded. A trial-type administrative hearing is not required when, as here, no facts are in dispute[2] and only the construction of a regulation is at issue. See *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33, 39-

[2] A stipulation in the district court (J.A. 13) eliminated from the case the only possible factual issue, i.e., whether the land was located within one mile of the meander line.

44. The issue presented was "a straightforward legal one". *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 167, 170. See, also, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149. Petitioner therefore was fully afforded his procedural rights when his written argument was received and considered at every stage of the administrative proceedings (see, *e.g.*, Pet. App. 4, 5, 14, 23, 26, 28).

Finally, the isolated importance of this case is another reason why further review by this Court is not warranted. It concerns only the effect on a single tract of land of a public land order which was superseded by P.L.O. 1654 (23 Fed. Reg. 4411) in 1958, using language different from that at issue here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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